United States Court of Appeals

for the Second Circuit

APPENDIX

74-1868

In the

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

No. 74-1868

KATRINA McEACHERN,
Plaintiff-Appellant

v.

ANDREW CONSIGLIO, et al,
Defendants-Appellees

On Appeal from the United States District Court
for the District of Connecticut

JOINT APPENDIX

Michael Avery
Williams, Avery & Wynn
265 Church Street
New Haven, Connecticut
06510
Attorney for Plaintiff-Appellant

PAGINATION AS IN ORIGINAL COPY

APPENDIX
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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

KATRINA McEACHERN,

PLAINTIFF,

VS.

ANDREW CONSIGLIO,
An officer in the New Haven
Police Department, and

CURTIS WILLOUGHBY,
An officer in the New Haven
Police Department,

individually and in their official capacities,

DEFENDANTS.

CIVIL ACTION

NO. _____

COMPLAINT

1. The plaintiff brings this action to redress violations by the defendants of her rights under the Constitution and laws of the United States and the State of Connecticut. Late at night, without a warrant and without any cause, excuse or justification, the defendants broke into the plaintiff's home, conducted a brief search which awakened and terrified the plaintiff and her family, and then departed having made no arrests and having seized no property.

2. The plaintiff brings this action to redress the deprivation under color of statute, ordinance, regulation, custom or usage of a right, privilege and immunity secured to the plaintiff by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States (R. S. 1879, 42 U. S. C. §1983), and arising under the law and statutes of the State of Connecticut.

3. The jurisdiction of this Court is invoked under 28 U. S. C. §1343 (3), this being an action authorized by law to redress the deprivation under color of law, statute, ordinance, regulation, custom and usage of a right, privilege and immunity secured to the plaintiff by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

4. During all times mentioned in this complaint, the plaintiff was, and she still is, a citizen of the United States, and she resided, and now resides, in the City of New Haven, State of Connecticut. She is of full age.

5. At all times mentioned herein the defendants were duly appointed and presently acting police officers in the Police Department of the City of New Haven.

6. At all times material to this complaint, the defendants were employed as police officers of the City of New Haven, State of Connecticut, and were acting under the color of their official capacity and their acts were performed under color of the statutes and ordinances of the City of New

Haven and of the State of Connecticut.

7. During all times mentioned herein, the defendants and each of them, separately and in concert, acted under color and pretense of law, to wit, under color of the statutes, ordinances, regulations, customs and usages of the State of Connecticut and the County of New Haven and the City of New Haven. Each of the defendants here, separately and in concert, engaged in the illegal conduct herein mentioned to the injury of the plaintiff and deprived the plaintiff of the rights, privileges and immunities secured to the plaintiff by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and the laws of the United States and the State of Connecticut.

8. At approximately 4:30 A. M. on July 7, 1971, the plaintiff and her family were asleep at their home at 671 Winchester Avenue in the City of New Haven, State of Connecticut. Suddenly, without warning and without announcing their presence or identity in any way, the defendants and other persons whose identity is unknown to the plaintiff broke down the rear door to the plaintiff's said home and entered the premises. The defendants and their companions, all of whom were unknown to the plaintiff, were not in uniform and did not identify themselves in any way. With drawn guns, the defendants and their said companions searched the plaintiff's home while directing at the plaintiff and her family, a stream of vile and abusive language. Defendants and their said companions thereupon left plaintiff's home, having made no arrests and having seized no property.

9. All of the events described in paragraph eight were conducted without the authority of a warrant and were utterly without justification or excuse in fact or in law.

10. Each of the defendants, separately and in concert, acted outside the scope of his jurisdiction and without authorization of law and each of the defendants, separately and in concert, acted wilfully, knowingly and purposefully with the specific intent to deprive the plaintiff of her right to:

A. Freedom from illegal search and seizure of her person, home, papers and effects;

B. Freedom from illegal detention and imprisonment;

C. Freedom from physical abuse, coercion and intimidation.

All of these rights are secured to the plaintiff by the provisions of the Fourth Amendment and the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States, and by Title 42, United States Code, Section 1983, and by Title 18, United States Code, Section 245 (1968), and by the statutes and laws of the State of Connecticut.

11. As a result of all the foregoing acts committed against her by the defendants, and each of them, plaintiff sustained injury to and loss of her real and personal property and effects, pain and suffering, degradation, humiliation, embarrassment and fear. As a result of the said acts the plaintiff has feared, and continues to fear, a repetition of the said acts of the defendants and as a result has suffered and continues to suffer anxiety and mental and emotional distress.

WHEREFORE plaintiff demands judgment against the defendants and each of them, jointly and severally, in the amount of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) and she further demands punitive damages against the defendants, and each of them, jointly and severally, in the amount of FIFTY THOUSAND DOLLARS ($50,000.00), plus the costs

of this action; and she further demands such other relief as to this Court seems just, proper and equitable.

KATRINA McEACHERN, PLAINTIFF

BY _____

John R. Williams
265 Church Street - Suite 608
New Haven, Connecticut 06510
Telephone: 203-562-9931

Her Attorney

Dated: February 23, 1972

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

KATRINA McEACHERN, Plaintiff	CIVIL ACTION
VS	FILE NO. 14908
ANDREW CONSIGLIO, ET ALS Defendants	MARCH 31, 1972

ANSWER

Each and every allegation of the complaint insofar as the same are directed against the defendant Andrew Consiglio is hereby denied.

THE DEFENDANT
ANDREW CONSIGLIO

By: James F. Greenfield for
GREENFIELD, KRIEK & JACOBS
his attorneys
900 Chapel Street
New Haven, Connecticut

THIS IS TO CERTIFY that a copy hereof was mailed to John R. Williams, attorney for the plaintiff, at 265 Church Street, New Haven, Connecticut, on March 31, 1972.

James R. Greenfield

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

KATRINA McEACHERN	:	
VS.	:	Civil Action No. 14908
ANDREW CONSIGLIO and CURTIS WILLOUGHBY	:	

DEFENDANT, WILLOUGHBY'S, ANSWER TO COMPLAINT

1. Paragraphs 1, 7, 8, 9 and 10 are denied.

2. As to paragraphs 2, 3, 4, 6 and 11 this defendant has no knowledge or information sufficient thereof to form a belief and therefore leaves the plaintiff to her proof.

3. Paragraph 5 is admitted insofar as it pertains to the defendant, Curtis Willoughby; the defendant has no knowledge as to the other defendants and therefore leaves the plaintiff to her proof.

THE DEFENDANT,
Curtis Willoughby

BY ______________________
GEORGE L. EASTMAN
His Attorney

This is to certify that a copy of the foregoing was mailed postage prepaid to all counsel of record.

____
GEORGE L. EASTMAN

JON O. NEWMAN

14908

8

CIVIL DOCKET

UNITED STATES DISTRICT COURT

Jury demand date: 4/3/72 by Defendant, Andrew Consiglio
7/31/72 by Defendant, Curtis Willoughby

C. [illegible] No. 106 Rev.

TITLE OF CASE	ATTORNEYS
KATRINA McEACHERN vs. ANDREW CONSIGLIO, An Officer in the New Haven Police Department, and CURTIS WILLOUGHBY, An Officer in the New Haven Police Department, Individually and in their official capacities	For plaintiff: John R. Williams 265 Church Street-Suite 608 New Haven, Conn. 06510 For defendant: James R. Greenfield (For: Andrew Consiglio) Greenfield, Krick & Jacobs 900 Chapel Street New Haven, Conn. Donald G. Walsh (For: Curtis Willoughby) ~~246 Church Street~~ 275 [illegible] New Haven, Conn. George L. Eastman (For: Curtis Willoughby) 265 Church Street New Haven, Conn. Roger J. Frechette (For: Andrew Consiglio) 215 Church Street New Haven, Conn. 06510

STATISTICAL RECORD	COSTS	DATE 1972	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed	Clerk	2/23	Roraback, Williams & Avery	15 00	
S. 6 mailed	Marshal	2/25	Deposit: C.F.100869		15 00
asis of Action: Action to redress violations of Constitutional rights claiming illegal search	Docket fee	6/21	Roraback, Williams & Avery	5 00	
[illegible]: by defendants seeking damages of $75,000.00	Witness fees	6/26	Deposit: C.F.100869		5 00
	Depositions				

DATE	PROCEEDINGS	Date Ord. Judgment
1972		
2/23	Complaint filed. Summons issued and together with copies of same and of complaint, handed to the Marshal for service.	
3/3	Marshal's Return Showing Service, filed.-Summons & Complaint.	
4/3	Appearance of Atty. James R. Greenfield of Greenfield, Krick & Jacobs entered for defendant, Andrew Consiglio.	
"	Answer, filed by defendant, Andrew Consiglio.	
"	Demand for Jury Trial, filed by defendant, Andrew Consiglio.	
7/31	Appearance of Atty. Donald G. Walsh entered for defendant, Curtis Willoughby.	
"	Demand for Jury Trial, filed by defendant Curtis Willoughby.	
12/20	Appearance of Atty. George L. Eastman entered for defendant Curtis Willoughby.	
1973		
4/27	Interrogatories to Defendant Curtis Willoughby, filed by Plaintiff.	
"	Interrogatories to Defendant Andrew Consiglio, filed by Plaintiff.	
5/7	Request for Entry of Default against defendant Curtis Willoughby for failure to plead, filed by Plaintiff. Default under Rule 55(a) entered. Markowski, C. M-5/7/73 Copies mailed to all Counsel.	
5/10	Motion for Leave to Take Depositions by Means of a Tape Recorder, filed by Plaintiff.	
5/21	Hearing on Plaintiff's Motion for Leave to take Depositions by Means of a Tape Recorder. Motion granted; stipulation on procedure to be submitted. Latimer, U.S. Magistrate. M-5/22/73. Copies mailed to all counsel.	
5/[illegible]	[illegible] Compelling Direct[illegible] from Defendant Consiglio, filed by Plaintiff.	
1974		
1/3	Answers of Defendant, Andrew Consiglio, to Plaintiff's Interrogatories, filed.	
1/25	Pre-trial conference held before Judge Newman 1-24. No order needed.	
2/22	Defendant, Curtis Willoughby's Answer to Interrogatories, filed.	
"	Defendant, Willoughby's Answer to Complaint, filed.	
2/25	Placed on trial list.	
5/9	Appearance of Atty. Roger J. Frechette entered for defendant Andrew Consiglio.	
5/14	Jury Trial Commences. Interrogatories for Veniremen, filed by defendants. Plaintiff's questions for voir dire exam, filed by plaintiff. Court reviews voir dire questions with counsel. 29 jurors respond to roll call. 3 jurors excused for cause. Basic panel of 20 names drawn. Challenges: Plaintiff 4; Deft Consiglio 3, 1 waived; Deft. Willoughby 4. 8 jurors impanelled and sworn. Panel excused until Wed., May 15, 1974 at 10:00 A.M. Newman, J. M-5/14/74	
5/15	Jury Trial Continues. Plaintiff's Proposed Interrogatories to the Jury, filed. Plaintiff's Brief Regarding the "Good Faith" Defense, filed. Defendant's (Consiglio) Request to Charge, filed. Question re the pending entry of default that has not been set aside, raised. Deft. Willoughby make oral request that default be reopened. Motion granted - default is vacated and trial to continue as to both defendants. 7 jurors report to the courtroom (Stanley Ward reported ill and excused from this case.) 2 Plaintiff's witnesses (Willoughby	

(Cont'd.)

D. C. 110 Rev. Civil Docket Continuation KATRINA McEACHERN v. ANDREW CONSIGLIO, Officer, et al

DATE 1974	PROCEEDINGS	Date Order or Judgment Note
	and Consiglio) sworn and testified. Jury excused while counsel argue probable cause on informant, and arrest and search. Court sustains objection to informant's identity. Court finds probable cause on arrest and search. Plaintiff's Brief Regarding Illegal Search, filed. Plaintiff Katrina McEachern, sworn and testified. Plaintiff's Exhibits 1 thru 6 filed. Court adjourned at 5:04 P.M. to May 16, 1974 at 10:00 A.M. Newman, J. M-5/16/74	
5/16	Jury Trial Continues. 7 jurors present. Plaintiff resumes stand for continued cross-examination. Plaintiff's Exhibits 7 thru 11 filed. 4 Plaintiff's witnesses sworn and testified. Plaintiff rests at 12:05 P.M. Defendant Consiglio is recalled to the stand for further questioning. Defendants rest at 12:07 P.M. Jury excused for lunch. In the absence of the jury, Defendants move for directed verdict. Motion denied. Summations: Plaintiff 2:20 - 3:05 P.M.; Deft. Consiglio 3:05 - 3:23 P.M.; Deft. Willoughby 3:23 - 3:26 P.M. Plaintiff Closing 3:26 - 3:45 P.M. Court's Charge 3:45 - 4:15 P.M. John Eliot drawn as alternate juror and is excused subject to call. Jury retires to jury room at 4:16 P.M. No exception to charge taken by plaintiff. Defendants take exception to charge. Court will not charge further. Verdict form and full exhibits handed to jury at 4:20 P.M. and they commence deliberation. Jury returns at 5:27 P.M. with a verdict in favor of each of the defendants. Court accepts written verdict and orders same recorded. Jury excused subject to call and Court adjourned at 5:30 P.M. Newman, J. M-5/17/74	
5/17	Court Reporter's Notes of proceedings held on May 15, 1974 (Trial), filed. Gale, R.	
"	Court Reporter's Notes of proceedings held on May 16, 1974 (Trial), filed. Gale, R.	
5/17	Judgment entered that plaintiff recover nothing of the defendants and that this action is hereby dismissed. Markowski, C. M-5/17/74 Copies mailed.	
5/15	Court Reporter's Notes of proceedings held on May 14, 1974 (Trial), filed. Gale, R.	
6/14	Notice of Appeal, filed by plaintiff. Copies mailed to U.S. Court of Appeals and all counsel.	
"	Cash Bond in the amount of $250.00 filed by plaintiff and deposited in the Registry of the Court.	
7/18	Court Reporter's Transcript of proceedings held on May 15, 1974 (Trial), filed. Gale, R. (2 Vols.)	

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

KATRINA McEACHERN Plaintiff vs. ANDREW CONSIGLIO, An Officer in the New Haven Police Department and CURTIS WILLOUGHBY, An Officer in the New Haven Police Department, Individually and in their official capacities Defendants	Civil No. 14908

May 16, 1974
New Haven, Connecticut

B E F O R E :

JON O. NEWMAN, U.S.D.J.

A P P E A R A N C E S :

FOR THE PLAINTIFF:

JOHN R. WILLIAMS, ESQUIRE
265 Church Street
New Haven, Connecticut

FOR THE DEFENDANTS:

ROGER FRECHETTE, ESQUIRE
Corporation Counsel
215 Church Street
New Haven, Connecticut

GEORGE EASTMAN, ESQUIRE
265 Church Street
New Haven, Connecticut

MR. WILLIAMS: I going to be quite brief, if your Honor please, because obviously your Honor has read the Dorman case as well as the rest of us have and has read Jones.

I think that there are a number of distinctions between the situation existing in Dorman and the situation existing here and those distinctions are not only the absence of the gun and not only the fact that there was a violent crime involved and -- incidentally, it is important to note that it was a crime in which there had been actual, and from reading the facts, utterly uncalled for, unnecessary violence and abuse directed towards the victim of the crime in the Dorman case, whereas none of that is present here.

In addition, there was the fifth point which the Court knows, and that is the likelihood of escape. If there is not a swift apprehension there is no suggestion that that was so here. Indeed, the suggestion was they were subsequently going to go to another place in the City of New Haven for the purpose of cutting the drugs and then presumably be returning home at the conclusion of that.

There was no suggestion they were about to make an escape, whereas in the Dorman case there was

reason to believe Dorman would discover shortly that he had betrayed his identity, whereas with regards to the Jones brothers it's just exactly the opposite. According to the detective, they had reason to believe they had been conducting this kind of business as a regular matter for a long time.

And, of course, we have the problem of its existence at night. That obviously was present in Dorman as well but the distinction there is that the entry in the Dorman case, as the Court says, was though not voluntarily peaceful. That is, the woman in the house opened the door and admitted them. That situation obviously is not present here and indeed the manner in which the officers entered, the speed with which they entered, made it impossible for someone to come to the door to meet them even under their version of the events

THE COURT: Let me ask you your view. This case Bristles with legal issues on which there is scant guidance, unhappily.

The Dorman Court, as I read it, seems to aggregate all of the circumstances surrounding the entry in determing whether the Fourth Amendment was violated. There are many cases, as you know -- you cited some of them to me, which focus on the method of

entry as being a circumstance which is beyond the pale, so to speak,in and of itself taints an entry, wholly apart from whether there was probably cause or reasonableness to affect the entry at all.

I am inclined to think the separation ought to be made. The Bivens case in our Circuit seemed to make it. The Court talked about the officers responsible belief in the validity of the search and of the manner of making it, which implies to me these are two separate aspects.

Now, I just raise it to you to inquire what your view is.

MR. WILLIAMS: I think they are clearly--first of all, Dorman didn't raise that problem because it wasn't present in the Dorman case and in aggregating the factors which they did aggregate, all of the factors that they brought together had to do with the reasonableness of making the entry without the warrant, but the cases on essentially the knock and announce case, if you will, are the same whether there is or is not a warrant, and in some of the knock and announce cases there is a warrant and some there is not a warrant,and all of those cases have treated that as a separate issue.

Indeed, the earliest cases in this country on that subject which did arise in Connecticut, if memory serves, were cases where there was a warrant. It seems to me a damage action against a bonds person, who it was described as a bail, in the decision, whatever that may mean, involves someone who had, if I remember correctly, an order of some kind directing him to make the apprehension but it was a situation where he broke in without going through the adequate procedures.

It seems to me that case has been cited in some of the Connecticut decisions that I have referred your Honor to. So I do think that it is a completely separate issue. I think that obviously we are entitled to prevail with respect to both of those issues on the law.

I don't think I need to say anything to your Honor on damages because your Honor has hit the point which has been made by a myraid of cases such as Basista vs Weir, Sullivan against Little Hunting Park and all of the others, that a violation of federal constitutional right results in damages of some kind and it's only a question of how much damages.

THE COURT: What about Mr. Frechette's

law torts where you talk about not only physical injury

point that the lost wages are not appropriate as consequential damages -- actually, it's not lost wages. I don't think there was testimony that wages were lost.

MR. FRECHETTE: She said she didn't work for three days and she got three something an hour.

THE COURT: I don't think she said she didn't draw her pay.

MR. FRECHETTE: That doesn't make her different -- I'm not claiming collateral as a defense to this.

THE COURT: I thought that the burden of the testimony was not that she was out dollars but that the distress of the situation simply caused her the upset and the inconvenience that necessitated staying home and it was the distress that was being alleged in the dollars.

MR. WILLIAMS: That is correct. There wasn't testimony on it but the trump is that what she did was take days off that she had coming so she was compensated for those days.

THE COURT: You are not claiming that dollars represented by those hours, it's simply an indicia of the distress?

MR. WILLIAMS: Yes.

probably the only state in all 50 that has it this way.

MR. FRECHETTE: Your Honor overruled me that there was no expert testimony to bring that to bear, so I claim that's not properly before you.

THE COURT: I don't think that is such a technical medical aspect.

MR. FRECHETTE: I realize that your Honor has ruled against me.

May I answer two questions that were raised in your comments with Mr. Williams.

MR. WILLIAMS: I wasn't quite through. The only other point I was going to make was in response to Mr. Frechette's attempt to analogize this action to a State Court action. The analogy he neglected to draw was the trespass situation on which we are all aware always results in some damage.

It goes without saying, even if you draw a state analogy you have damages and it's only a question --

THE COURT: What about another very troublesome part of this case, which is the appropriate standand for the trier, for the jury if it's a jury case or for me if the burden of Mr. Frechette's argument is that the case is so clear that it need not be submitted to the trier under normal court-jury division,

and your point has been that there is no good faith defense here?

MR. WILLIAMS: That's correct.

THE COURT: Indeed there is not even a probable cause defense. You come at that apparently from trespass cases?

MR. WILLIAMS: Yes.

THE COURT: I am very skeptical of that argument because it seems to me that the law of trespass, while it does deny the citizen trespasser a good defense, that he stumbled on to somebody -- he is a trespasser even though he thought it was his own home.

But a police officer, who has probable cause to make an arrest and reasonable grounds to think a person is on a certain property, as I understand it is not a trespasser if he goes onto that property to make the arrest.

MR. WILLIAMS: My understanding, your Honor, is that on those facts without more, he is not a trespasser if he is correct. If he finds the person there. But that if the person isn't there, if he is mistaken, then he is a trespasser so he enters at his peril.

there is probable cause in Dorman but would he think

THE COURT: I don't think that is the way that Harper and James treatise views it. If Connecticut has a special law --

MR. WILLIAMS: No, Connecticut doesn't.

THE COURT: I don't think so.

MR. WILLIAMS: It's my understanding, your Honor, is that if the offense for which the person was being sought was one which posed immediate danger, that would be a different kind of situation. In the restatement there is an example cited of a person who has probable cause to believe that a person inside the house is attempting then and there to commit the crime of murder and it turns out he was mistaken, a police officer, and the restatement says under those circumstances the entry is proper, it's not a trespass, but I think that the distinction that is drawn there is that there is that immediate threat because elsewhere the restatement states that with regard to any privilege of entry, if it turns out that the person entering under a reasonable believe that he was so privileged is wrong, then he is a trespasser.

I think there is another distinction which--

THE COURT: That is not said with police officers -- that is just said in the general

MR. FRECHETTE: Fair enough. Thank you.

context of a citizen who thinks he has the right to be on the property and it turns out he is wrong.

MR. WILLIAMS: The restatement offers no examples on that point with regard to policemen. It does offer the example of a sheriff executing a writ and suggests that there if he makes a reasonable mistake he is a trespasser. In that particular --

THE COURT: I think on that point I am prepared -- what I understand to be the Harper and James statement of common law, that the police officer, if he has probable cause to arrest and reasonable grounds to believe the person to be arrested is on the property, then he is not a trespasser.

Now, what the standard is by which the reasonableness of his conduct should be judged is another question but at least I don't think it takes out of the case whatever defense it is that the Bivens case has put into it and that is another troublesome problem.

Frankly, I had thought from Pierson that the only issue was whether the constitutional violation had been committed that is to say, whether there has been an invasion of the Fourth Amendment right, and I think that's what the Pierson case says. It uses good

MR. WILLIAMS: Before you recess, if I

faith in another context as to the officer's responsible belief that a lawyer later declared unconstitutional was valid at the time he acted, and the case you cited from the Seventh Circuit, I think your Brief says the Fifth Circuit but I know the case you mean --

MR. WILLIAMS: It is Joseph against Rowlen.

THE COURT: The Seventh Circuit makes that point very clear, that the good faith defense is something quite apart from the probable cause defense and is not a second line of defense, as it were. The Bivens case in this Circuit, it seems to me, is quite different and there both the majority and the concurring opinions say that there are two lines of defense, and they distinguish the constitutional standard and what Judge Lumbard calls the less stringent standard, which is a defense to a police officer's liability.

Now, I am troubled by that but I think I am obliged to follow it.

MR. WILLIAMS: If it please the Court, I do think that Bivens is not applicable straight across the board to an action under 1983 against State Police Officers.

THE COURT: I think it is. The Court

says what they are doing there is applying the same standard that would be so in a 1983 action. I suspect what you're really saying is that he ought not to have come to that conclusion.

MR. WILLIAMS: It is dictum --

THE COURT: It is dictum but it couldn't be a clearer expression viewed and I really don't think I can disregard it.

MR. WILLIAMS: I certainly can understand the problem that the Court presents. I can only say that I think that the law is not that way. I think that the law is that there are two lines. I think that follows certainly from your Honor's decision in the Thamel against East Hartford.

THE COURT: Thamel, of course, involved a misdemeanor and the common law there is so different from the law of felonies that I just think that it's all right to stay with Pierson for the common law when you're dealing with an area where the common law makes a distinct difference.

Once you are in the area of a felony arrest and searches to apprehend suspected felons, then it seems to me the Bivens case tells me what standard I am to apply.

MR. WILLIAMS: I can't argue the Bivens case has been distinguished and been distinguished by the Second Circuit -- I do think, however, --

THE COURT: I will observe that when Judge Lumbard came to apply an aspect of the ruling in Arroyo, he didn't draw the same distinction. That was excessive force. He just said there was excessive force. He didn't say to himself the question was, a, is there excessive force and, b, did it offer reasonable belief he was using only necessary force, so the state of the law is very unclear on this but I am afraid that the last word of the Court of Appeals is what I have to follow.

THE COURT: Now, I am also not at all certain that I was right yesterday in acceding to the view of both sides that the probable cause question is for the Court and I'm even less sure of it today because now there is a conflict in the testimony that bears on probable cause.

If the facts were totally undisputed that's one thing but now there is a sharp conflict in testimony of whether the officers inquired once they were in the house and there is some conflict as to whether they gave notice before.

I can appreciate what the defendant's agrument is going to be, that the young lady didn't hear them because she was on the phone, but I think it is a fair issue for the trier of the facts as to whether they didn't hear them or they didn't announce their presence and particularly since there is such a conflict as to what was said inside, any jury, any fact finder that disbelieves the officer on what he said inside is certainly entitled to disbelieve him on what he claims he said outside, so I think those are all fair issues for a trier and under thosecircumstances, although I am going to run the risk, if not the certainty, of confusing the jury I think I have to give them a very elaborate reasoning process to go through.

I think I have to first tell them the factors that bear on probable cause and then I have to explain to them that even if there is not probable cause or both to arrest, to go in to arrest on the manner of entry, all those three elements, even if there is not probable cause the officers have a defense if they have the subjective good faith to believe that what they were doing was valid and if objectively that was a reasonablebelief. I think that is what the Bivens court wants me to do.

MR. FRECHETTE: May I be heard on that.

THE COURT: This may be one of those situations where it's easier to spin out the standards in appellant opinions than to give jury charges but I think that is what I am faced with.

MR. FRECHETTE: If your Honor is, as your Honor says, going along with Bivens then you are right back where you were yesterday, I respectfully submit, because there is no testimony from anyone that they did anything but act at the tip of an informer and we went through all of that.

THE COURT: I understand that but I don't think --

MR. FRECHETTE: Even if you disbelieve your first test on the reasonableness, there is no question on probable cause from anybody.

THE COURT: You mean probable cause to arrest the Jones brothers?

MR. FRECHETTE: That's right, and to enter the house.

THE COURT: No. I think there is a fair issue as to whether there is probable cause to enter the house. Now, if I had to rule on it as the trier it would be a very close question in my mind. I

indicated yesterday I thought there was probable cause because I was not considering it as a search. I was considering it only as an arrest and I was also disregarding the night factor.

I am satisfied that I was wrong in disregarding those two factors, that the entry ought to be viewed as a search to arrest somebody.

The question is, is it a reasonable thing to have done. If I had to rule on that I would be very troubled by it and I am not at all sure I would come out the same way I indicated yesterday but what I am beginning to be more persuaded of, that I ought to make that judgment, that at a minimum there is a fair issue for the trier on that question.

There is certainly so clearly a valid entry that I ought not to let a trier even consider it.

MR. FRECHETTE: Nothing changed since yesterday, your Honor.

THE COURT: The facts haven't, but the appropriate standard has in my mind.

MR. FRECHETTE: There is nothing that has come into evidence today --

THE COURT: I understand that.

MR. FRECHETTE: That has anything to do with the situation that we discussed yesterday.

THE COURT: I quite agree with you. The facts on that have not changed at all but my view of the standards have changed. I think I was wrong yesterday in determining the standard. Now, whether that changes the result is not automatic, but I do think that the issue is one for the trier and not to me. After all, in Bivens the court says the officers have a defense if they plead, which was Mr. Williams' point -- he wants -- if they plead and prove probable cause and good faith, well, I have to believe that when the court said prove it, they then prove it to the satisfaction of the trier.

MR. FRECHETTE: I submit for your Honor's consideration that there is no evidence from which reasonable men could differ and, therefore, it's not an issue for the fact but for the -- but for the Court. Nothing has changed on that point.

THE COURT: I agree with you that the facts haven't but if the test is whether they have reasonable grounds not merely to arrest but reasonable grounds to go into the dwelling to arrest and to do it at night, that standard is not a clear -- is not

clear on these facts.

MR. FRECHETTE: Let me suggest --

THE COURT: It is at a minimum, if I had to rule on it, I might well rule there wasn't probable cause but at a minimum it's sufficiently within the gray, that I can't say it would be unreasonable if the jury thought it was unreasonable.

MR. FRECHETTE: Might I suggest, your Honor, and I really don't care which way you go on it, but I say that on the evidence, reasonable men cannot differ on it. It has to be made by the Court.

THE COURT: No, I think there is a ground -- I don't think a jury would be acting unreasonable if they thought that both the decision to enter and the manner of entry was not support by a reasonable belief in its validity.

MR. FRECHETTE: I don't want to --

THE COURT: As I say it is a very conceptual matter for them to have to deal with, but I think if I'm to follow Bivens case I have to give them that standard. I can't just tell it to myself and give them some general instruction as to who did they think should win. It is going to be complicated but I think I have to do it that way.

THE COURT: You have heard the evidence and you have

MR. EASTMAN: As I understand -- part of the motion for directed verdict -- as I understand Mr. Williams, he is not claiming the wages were lost but that it was simply a manifestation of her nervousness, and following that I have heard no other evidence as to possible damages and I would think that any charge to them on the particular damages would be a matter of conjecture and surmise.

I don't see what measure they could possible use.

THE COURT: There is always a bit of surmise when you're trying to assess a constitutional court but that has not dissuaded any court from permitting a trier to consider it and bring in some realistic number. Now, like any damage assessment, it is possible that the number would be just not within any fair limits --

MR. EASTMAN: What I am basically saying to the Court is this, without the measure of damages, and I take it they would be in your mind compensatory damages, they have no basis upon which to judge for any compensatory damages and following that, under the--

THE COURT: You are quite right, they don't have the normal standards that arrive in common

law torts where you talk about not only physical injury but pain and suffering and things like that, but constitutional torts, invasion of privacy is compensatable.

Now, you are quite right in saying it's really a matter of conjecture how you put a value on it, but the cases, as I understand them, have said that it is perfectly all right for a trier, in this case a jury, within some outer limits, of course, to make their individual assessment of what the value to a citizen is of having his privacy unconstitutionally invaded.

They don't have ready bench marks, that's true, but it is an area where they are entitled to apply their judgment.

MR. EASTMAN: Following that, as I understand the complaint, there is a claim for punitive damages. Now, my understanding in Connecticut law of damage, on punitive damages there are two types: one granted by the statute and more specifically in the section on motor vehicle violations, which are a subject of the court assessment, and that's not the case in this particular -- the other situation is exemplary damages, so-called, and in Connecticut

witnesses who testify. In doing that, you will use the tests

probably the only state in all 50 that has it this way. Usually if one dollar of compensatory damages, as I understand it, in the other states then it can be any number of dollars in punitive damages, however, in the State of Connecticut as far as the exemplary damages and sometimes called punitive damages,the measure of damages are the costs to the individual and, in other words, there should have been some testimony placed in the evidence bearing upon that particular factor and it's usually something in the vicinity of court costs and attorney's fees and I've heard no testimony.

I do not think it would be proper for the Court to charge on exemplary damages.

THE COURT: You mean because of the Connecticut rule?

MR. EASTMAN: Yes, sir.

THE COURT: There are, of course, a number of cases where punitive damages in a civil rights action have been allowed either where there is proof of malice, and I wouldn't submit that theory to this jury because I don't think there is any evidence to support malice, but the other theory is where the action taken by the officers is such that the trier feels some deterrent aspect ought to be expressed, and

not depends on your own sound judgment.

the cases that have done that seem to me not to view it as a matter of the state law of damages but rather as a matter of the federal law of 1983.

MR. EASTMAN: I am not prepared -- I was just surmising myself after Mr. Williams indicated that he was not pressing the wage claim situation.

MR. FRECHETTE: I forgot to tell your Honor one thing, if I might, and it goes back to the case you gave us yesterday. Mr. Williams said in support of what your Honor is doing, there is always the threat of escape as there was in that case. The threat of escape is present in this case.

THE COURT: I understand that. Clearly there is a circumstance that has a bearing here, the circumstance being the information that the Jones boys were going to leave early in the morning.

MR. FRECHETTE: I can't distinguish those two cases, that's what bothers me. I cannot distinguish -- I can't read that case and see where it makes a particle of difference to this case.

THE COURT: You see, even if they were identical I think I would have to give it to the jury because I don't think even Judge Leventhal in the Dorman case would have said that not only does he think

of any rights, privileges or immunities secured by the

there is probable cause in Dorman but would he think that it would be unreasonable for a trier to come out differently. That is a close case. The whole opinion I think fairly evidences that it was a troublesome issue.

MR. FRECHETTE: Bartlett is a summary judgment case. I really --

THE COURT: I'm sure that is the same as our situation.

MR. FRECHETTE: I think that case also-- I will grant you, you don't have the entry but everything is right with it, it's really --

THE COURT: This case is essentially--

MR. FRECHETTE: Then I say to you that the Dorman case is on all fours with us.

THE COURT: You see, it's no different than if Dorman had been a civil rights case and it went to the jury and the defendants had won. The fact that they won would not mean this jury could consider identical facts. Triers are entitle to come out differently on facts that are fairly within an area where the reasonable could go either way.

MR. FRECHETTE: I understand that.

THE COURT: Even if it were identical

I don't mean to suggest that the plaintiff may win just because this case would go to the jury.

MR. FRECHETTE: Fair enough. Thank you, your Honor.

THE COURT: I hope that I have conveyed to you essentially the standard I will use to the jury so that your arguments can be guided.

In summary, it will be if there is no probable cause that is a complete defense. If there was not probable cause they still have a defense if they acted with the subjective good faith that in their own minds they were in good faith, and if objectively they had a belief in th validity of what they were doing, that is to say, the lawfulness of what they were doing, and if that belief objectively was a reasonable one, I plan to view it though in three distinct elements.

As to the right to arrest, as to the right to enter and as to the manner of entry.

MR. WILLIAMS: For the record, I would like to say that to the extent which your Honor's decision does not follow the Joseph versus Rowlen case, I would object to the --

THE COURT: There is no question I am not following that case. I think it takes a view of Pierson which the Bivens court in this Circuit does not

with the right that the plaintiff alleges has been denied her.

share and I feel obliged to follow the Bivens language.

MR. WILLIAMS: Before you recess, if I could ask a procedural question, is it my understanding that the procedure this afternoon will be the complainant will open and close and both defense counsel will be concluded.

THE COURT: Yes. There is one thing I did not take up with you is who has the burden of proof. Again, Bivens seems to suggest that these are defenses on which the defendants would have the burden of proof. Frankly, I don't quite understand how a plaintiff is relieved of the burden of showing that the tort has been committed because the nature of the cause of action is denial of a civil right and the civil right has not been denied unless there was an entry without probable cause, so I must admit I'm just at a loss to understand how Bivens wants the issue put to the jury with respect to the burden of proof.

MR. WILLIAMS: I think, if your Honor please, that our burden is to show a warrantless entry because the law under the Fourth Amendment is clear --

THE COURT: That may be the rationalizing fact that Bivens just didn't spell out. There is a lot of law that in the normal situation, if there

is a warrant the defendant has to do a lot of shouldering the load. If there is no warrant then this state does, and it may be that same principle ought to apply here, so I think I will place the burden by a preponderance of the evidence on the defendant to establish probable cause or the lesser standard of good faith and a reasonable belief in the lawfulness in what they did.

MR. FRECHETTE: Your Honor, of course, it would be my claim that he has pleaded it and he has to prove it. He has pleaded unlawful actions --

THE COURT: I understand that but he has shown an invasion of his privacy -- her privacy in this case, on a warrantless entry.

MR. FRECHETTE: He alleged it -- all he has alleged is unlawful entry by my people.

THE COURT: I understand that but once he has shown the entry and shown the lack of a warrant, then it becomes a matter of defense as to whether the entry can be justified.

MR. FRECHETTE: We don't take exception but that's not what we would agree is the law that should apply. I think he has accused us of violating 42-1983. He has to prove it.

THE COURT: I don't think we are in any

agreement on that. The question is what are the elements of that violation. His view is they are satisfied when the entry is shown and it is shown to be warrantless.

MR. FRECHETTE: Except he put the witnesses on and he proved how they went in.

THE COURT: I don't think that the burden of proof shifts depending on how much evidence you put in.

MR. FRECHETTE: I think it might well. I think it's a different thing, for example, in a State Court and warrantless arrest you put the clerk on and ask if there is a warrant in the file, and we rest. It didn't happen here. If in a State Court I put detectives on I have the problem then.

THE COURT: I wouldn't have thought so. As the trial in the probable cause situation I certainly wouldn't shift the burden of proof depending on who went first with the evidence. That is just a matter of order of proof and doesn't affect --

MR. EASTMAN: I join with Mr. Frechette.

THE COURT: All right, recess until 2.

(A recess for lunch was taken.)

preponderance of the evidence that the decision to enter was

AFTERNOON SESSION

THE COURT: Let me make a slight modification to what I told you before. In the interest of trying to somewhat simplify this for this jury, the concepts are going to be confusing enough, and I have suggested that there were really three aspects of what they were focusing on: probable cause to arrest, the reasonableness of the decision to enter and the manner of the entry.

It seems to me that there really isn't a dispute on this record as to probable cause to make the arrest, but the issues really turn on probable cause to enter the McEachern home to look to arrest the Jones, and the second question of the reasonableness of the manner by which that entry was affected.

So I will focus their attention hopefully on those two aspects of the incident, as to each to ask them to go through the rather elaborate process of determining first whether what occurred was reasonable in the constitutional sense.

If they find it was, then there is no denial of a right. If they find it was unreasonable, an unreasonable decision to enter or an unreasonable manner of entry, then they take up the question of

defense and they consider whether the officer had good faith in believing that it was lawful and whether he had -- and whether his belief that it was lawful was a reasonable belief.

Are we clear?

MR. WILLIAMS: Yes.

THE COURT: We have a copy of a verdict form which you should perhaps look at.

MR. FRECHETTE: I don't think this is a punitive damage case.

THE COURT: It is a close one as to whether it's in the case. There certainly is no malice--

MR. FRECHETTE: I cannot see this as a punitive damage case and I would object to the jury form on that ground. I do fairly want you alerted to my position, that's all I am saying.

MR. EASTMAN: I would object for the same reason.

THE COURT: Well, I will submit it to them only on the theory of the deterrence, not malice-- I will submit punitive damage to them only on the theory of the deterrence and not on the basis of malice. I don't think there is any evidence of malice.

MR. WILLIAMS: I think that under the

interval of time to permit the resident to come to the door and

Stolberg case, even if there is not malice the jury would be entitled to return punitive damages if they found that the acts were in gross disregard of constitutional rights or in reckless disregard of whether or not they were violating constitutional rights.

THE COURT: I will give it to them under a theory that if they think there is a violation, whether it's sufficiently serious that punitive damages are needed to be a deterrent to others. I think that is the most that this set of facts would call for and I agree with Mr. Frechette, it is a close question but I think there are sufficient -- there is sufficient authority that a punitive damage award is permissible even if only as a deterrent effect.

I think the reason is because it is appropriate in civil rights cases to award no compensatory damages and then add on something by way of punitive, so it is not the normal tort situation where you have already given several thousands of dollars by way of compensation and then ought to be rather limited in inviting extra dollars by way of punishment, but it is a close question I grant you.

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lawful and if they believed that, whether it was reasonable for

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

- -x

KATRINA McEACHERN,

Plaintiff,

vs.

ANDREW CONSIGLIO, An Officer in the New Haven Police Department, and CURTIS WILLOUGHBY, An Officer in the New Haven Police Department, Individually and in their official capacities,

Defendants.

Civil No. 14908

- -x

May 16, 1974
New Haven, Connecticut

B e f o r e:

JON. O. NEWMAN, U.S.D.J.

what damages, if any, to award.

Appearances:

For the Plaintiff:

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New Haven, Connecticut

For the Defendants:

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GEORGE EASTMAN, Esq.
265 Church Street
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of constitutional right, and if there was, is there a valid

THE COURT: You have heard the evidence and you have heard the arguments. Now it is my duty to tell you the rules of law that you are to apply in deciding this case. The facts of the case will be determined by you.

You have heard the evidence and if there are any conflicts in the evidence, you resolve them and you decide what you believe happened on the night and early morning hours in question. Once you have determined those facts, apply to them the legal rules that I am going to endeavor to explain to you now.

Now, in determining facts, you can draw such natural and logical inferences as you think are justified, but don't go outside the evidence, don't resort to guesswork or conjecture.

Now, in considering evidence in any case there are two types of evidence that you can consider. One is direct evidence - such as testimony of an eyewitness, what a person saw, what a person heard. The other is indirect or circumstantial evidence: that is, inferences which may be drawn with reasonable certainty from facts.

The law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of the evidence. Each type of evidence, whether direct or circumstantial, should be treated equally.

Now, in this civil action, I will have occasion to refer

to burden of proof. Burden of proof is sustained on the different issues I will mention to you, when that issue is proven by what we call a preponderance of the evidence. Now, that is different than it would be in a criminal case, because this is a civil case and not a criminal case.

In a criminal case, you have probably heard of proof beyond a reasonable doubt, but in a civil case, the standard is proof by a preponderance of evidence.

That means simply to prove that something is more likely so than not so. Preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not. It doesn't turn on the number of witness, but it means that the evidence on behalf of the party who has the burden of proof must be greater in weight in your judgment than the evidence opposing it.

If you like, visualize it as a pair of scales. If the scales are absolutely even, then the party who has the burden of proof hasn't sustained it. If the scales tip a little bit in that person's favor, then that person has sustained the burden of proof, but it's a matter of the weight and quality of evidence, not the quantity.

Now, in deciding the facts of this case, you are going to have to determine the credibility, the believability of the

MR. FRECHETTE: I would like to keep our record straight.

witnesses who testify. In doing that, you will use the tests you would ordinarily use in determining the truth of matters important to you in your everyday life. Consider the demeanor of the witness on the stand; any interests that he or she may have had in the outcome of the case; and any bias, prejudice, either for or against either party; the opportunity of the witness to observe; their reason to remember; the inherent probability of their story; its consistency or lack of consistency; and its corroboration or lack of corroboration with other evidence in the case.

You should scrutinize all the testimony given, consider each witness' intelligence, motive, state of mind, and manner on the stand.

You should also bear in mind that if you find that a witness has testified falsely on any material point: that is, any really important point, then you may take that into consideration in determining whether he or she has testified falsely on other points. Simply because you find a witness has not testified with respect to one fact accurately doesn't necessarily mean that he or she is wrong on every other point. A witness may be honestly mistaken on one point and be entirely accurate on others. But if you find that a find that a witness has deliberately lied on a material point, it is only naturel that you should be suspicious of that person's testimony on other points. Under those circumstances, you are entitled to

THE COURT: I raise it because while Courts of Appeals disbelieve the testimony entirely. Whether you believe it or not depends on your own sound judgment.

It is also relevant in considering credibility to consider the fact that a witness has been convicted of a felony on one or more occasions. The fact of prior convictions does not, of course, mean that a witness is not to be believed, but it is one circumstance to consider in weighing the credibility of the witness. And as I mentioned to you earlier in the trial, that's the only purpose that a prior conviction can be considered by you, and that is to be considered along with everything else in determining the credibility of that witness' testimony and for no other purpose.

Now, in this suit, plaintiff, Mrs. McEachern, has brought a civil suit against Mr. Consiglio and Mr. Willoughby. They are two separate defendants, and you are to consider each separately. Whether you find for or against one doesn't necessarily determine whether you find for or against the other. They are each entitled to have their liability determined separately.

This case is brought in the Federal Court because the plaintiff alleges that the defendants have denied her a right secured by the Constitution of the United States. The suit is brought here under a section of federal law which reads as follows -- it's very short -- "Every person who, under color of any statute . . . of any State . . . subjects or causes to be

subjected any citizen of the United States to the deprivation of any rights, privileges or immunities secured by the Constitution shall be liable to the party injured. . . ."

So what you will have to determine in this case are the following: Did the defendants act under what we call color of law -- I will explain that in a minute -- did the defendants deny the plaintiff a right secured by the Constitution: do they have a defense against liability; and if all three of those questions are answered in favor of the plaintiff, what damages, if any, is the plaintiff entitled to.

Now, the first question is fairly easy. Acting under color of law simply means acting in ones capacity as a police officer, as far as this case is concerned, and there really isn't any dispute, really, that at the time of the incident, both defendants were police officers of the City of New Haven and were acting in their official capacities.

The difficult questions in this case arise when you come to consider whether the plaintiff was denied a right secured by the Constitution and whether the officers have a defense to the plaintiff's claim.

Your task in deciding those questions is not an easy one. You have to be concerned with competing interests, both of which are very important. On the one hand, there is the interest of a citizen to enjoy her Constitutional right to be secure in her home. On the other hand, there is the interest

the interest of police officers in performing their duties. I don't mean to suggest that the plaintiff may win just because the privacy of her home was invaded. Nor do I mean to suggest that the police officers may win just because they were on duty. The standards you have to apply are rather subtle, because the law tries to accommodate the competing interests of both the citizen and the police officers.

Unfortunately, the standards are also rather complicated. Let me first set them out in summary form, and then go back over them in some detail.

The plaintiff has a constitutional right to be secure in her home against unreasonable searches. So if there was an unreasonable search of her home, she was denied a right secured by the Constitution. Even if she was denied such a right, the officers have a complete defense to this suit if they in good faith believed that what they were doing was lawful and -- this is a dual requirement -- and if they believe in the lawfulness of what they were doing was a reasonable belief.

Now, in determining whether a constitutional right was denied and if so, whether the officers have a defense to such action, you must focus on two separate aspects of this episode. The first concerns the decision by the officers to enter the plaintiff's apartment, and the second concerns the manner in which they entered her apartment, and those are two separate aspects, and you are to consider them separately.

Let me go into this in some detail. Let me start with the right that the plaintiff alleges has been denied her. She sues for violation of a right protected by the Fourth Amendment to the Constitution of the United States. Here is what that amendment says, very short statement: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." Then it goes on to talk about warrants being issued only on probable cause. As you can see, what the Constitution protects against is "unreasonable searches," and it also contemplates that generally there will be warrants. In this case, the evidence is undisputed that the officers went into the plaintiff's apartment in an attempt to arrest the Jones brothers. It is also undisputed that they didn't have a warrant.

Whether the plaintiff's constitutional right was violated depends upon whether the decision to enter her house to make that arrest of the Jones brothers without a warrant was a reasonable decision under all the circumstances.

In this case, there really isn't any dispute that the officers had a reasonable basis for wanting to arrest the Jones brothers. In other words, if they saw them on the street, the Jones brothers, they would have had a right to arrest them. The question, the first question for you is whether the defendants denied this plaintiff, Mrs. McEachern, her constitutional right to privacy when they went into her apartment in an effort to find

the Jones brothers and arrest them.

This entry was a search, it was a search for the Jones brothers. Generally, a search is not valid under the Fourth Amendment if made without a search warrant. Let me explain why a warrant is generally required. Police officers all the time have situations where they think they either ought to arrest or ought to make a search. By requiring a warrant, the law requires the police officer to go before some neutral person, maybe a judge of this court, or it may be a magistrate, or some other proper official, but some person other than the police themselves, and tell that neutral person why it is they want to arrest someone or search some place, and then if they persuade that person that, indeed, they have a sufficient reason, a warrant is issued, but the warrant requirement makes sure that the officer doesn't get to do this on his own, so to speak, and the Constitution has a warrant provision, because it was deemed important, as a general rule, to have warrants, to be sure police officers did secure prior approval before they arrested people or searched them, so warrants are important and are generally required, but in some limited circumstances a search is reasonable within the meaning of the Fourth Amendment, even if made without a warrant. But bear in mind that searches without warrants are the exception and can only be justified by special circumstances, what the law sometimes calls exigent circumstances, circumstances that make it reasonable to act

promptly to enter a home to make an arrest and to make that entry without a warrant.

Now, several factors bear on the reasonableness of such an entry into a home without a warrant. They are, in this case, whether the officers had a sufficient basis for believing that the Jones brothers were then at 671 Winchester Street, plaintiff McEachern's apartment; whether there was time to get a search warrant; whether taking the time to get a warrant created an unacceptable risk that the Jones brothers might leave and take the heroin with them; whether it was reasonable to station one officer at the apartment while the other went to get a warrant; whether the crime the officers believed the Jones brothers had committed was serious enough to justify prompt action to find and arrest them; and whether the time of night was such that special care should be taken to be sure the officers had the right apartment before entering. In short, all of the circumstances that you find to have existed at the time the officers decided to enter the apartment may be considered in deciding whether that decision to enter without a warrant was a reasonable one. If you conclude it was reasonable to enter the apartment without a warrant, then there was no violation of plaintiff's constitutional right; but if you find that it was unreasonable to enter without a search warrant, then her constitutional right was violated. And since the officers had no warrant, they yave the burden of proof to persuade you by a

preponderance of the evidence that the decision to enter was reasonable.

Now, if you find the search was reasonable, even though without a warrant, then that's the end of the case as far as the decision to enter is concerned. And the defendants would not be liable for the entry. But if you find that the entry without warrant was unreasonable, then you have to consider whether the officers have a defense.

As I mentioned, they have a defense if two things are so. If they believed in good faith that their conduct was lawful, and if that belief in the validity of their entry, if they had such a belief, was a reasonable belief. The first question, the good faith part of that is subjective as to either officer you are considering at the time. The question is: did he believe in hiw own mind that his conduct was lawful? The second part of the defense test is subjective -- excuse me -- is objective. Let me go over that again. The first part is subjective; it is whether the officer in his own mind had a good faith belief in the reasonableness of what he was going; but the second question is objective, it's if he believed his conduct was lawful, was this a reasonable belief under all the circumstances? That is, was it a reasonable belief in the validity of the search to find the persons to be arrested?

Now, the burden is on the officers to prove by a preponderance of the evidence that they had a good faith belief

and that such a belief was a reasonable belief.

So if the entry without warrant was reasonable, there was no violation of constitutional right. If the entry without warrant was unreasonable in view of all the circumstances, then you have to decide whether or not the officers have a defense, and they would have a defense only if they had a good faith belief that what they were doing was lawful, and if that belief was reasonable.

I know it's a bit confusing because the word "reasonable" comes up in different contexts. When you are trying to determine whether the plaintiff's right was violated, you have to determine the reasonableness of a warrantless entry at nighttime. Then if you find that the search was unreasonable, according to the Constitution, then you have to consider whether it was reasonable for the officers to believe that the search was reasonable.

So far, I have been concerned only with the decision to enter the apartment. After you have considered the issues that relate to the decision to enter, then you have to go through the same analysis with respect to the manner of entry. This is a separate part of the case. Here, again, you start by considering whether the manner of entry was reasonable or unreasonable under all the circumstances. Forced entry by police officers into a private dwelling is generally unreasonable if it's not preceded by an announcement of their authority and an appropriate

interval of time to permit the resident to come to the door and open it. As you can appreciate, that's an important requirement.

How much time is appropriate varies with the circumstances. Certainly, the fact that this entry occurred at night is one factor that bears heavily on the time that would be appropriate for a person to come to the door. On the other hand, the information that the officers had about the people they thought were inside is also relevant for you to consider.

In this case, the evidence is in dispute as to just what happened as the officers made their entry. You have to resolve the factual disputes and make your own conclusion as to what you believe the facts are.

Now, again, since the entry was made without a warrant, the burden of proof is on the officers to show by a preponderance of the evidence that the method of entry was reasonable. If you find it was reasonable, then the officers have no liability because of the manner of entry; but if you find, either because they didn't give notice of their authority, or because they didn't giveit clearly enough, or because they didn't wait long enough for someone to respond, if you find for those reasons that the manner of entry was unreasonable, then you have to consider, just as you did with the decision to enter, whether the officers have a defense.

In other words, you will have to decide whether the officers in good faith believed the manner of their entry was

lawful and if they believed that, whether it was reasonable for them to believe in the validity of their entry. Here, again, the officers have the burden of proof to establish by a preponderance of the evidence that they had a good faith belief in the lawfulness of the manner of entry, and that such a belief was a reasonable one for them to have.

Let me try to recapitulate that. Consider separately the officers' decision to enter without warrant and the manner of their entry. As to each aspect, first consider whether under all the circumstances the decision to enter or the manner of entry was reasonable, was consistent with the constitutional standards I have tried to explain.

If you find that either the decision to enter or the manner of entry was not consistent with constitutional standards, then consider whether the officers had a good faith belief in the lawfulness of the decision to enter, or the manner of entry, and whether that belief was a reasonable one. And I think I pointed out the defense aspect is a dual requirement. The defense is established only if they had both a good faith belief in the lawfulness of what they were doing, and if that belief was a reasonable one.

If you find with respect to either the decision to enter or the manner of entry that the plaintiff was denied a constitutional right, and that one or both of the officers do not have a defense to such action, then you should consider

what damages, if any, to award.

There are two kinds of damages that you may consider. The first is for ordinary damages, damages that compensate the plaintiff for the denial of her constitutional right, if you find there was such a denial. It is difficult to place a dollar value on the denial of a constitutional right. You simply have to make your own judgment as citizens as to the cost of having one's constitutional right to privacy impaired by what occurred in this case. You can consider the plaintiff's reaction to what occurred in making this determination, the extent to which she was distressed and upset. Whether or not you determine she is entitled to damages by way of compensation, you may also decide whether she should be awarded any punitive damages. In a case like this, you may consider whether the denial of a constitutional right, if you find that occurred, was so serious that those liable should pay a penalty so that in the future others will be deterred from engaging in the same conduct. Whether you decide to award any punitive damages is entirely within your discretion.

Now, as I have indicated, these are subtle questions, and the relationship between the issues is a bit complicated. I have tried to set them out perhaps overly methodically, but I think it's important for you to go through it step by step and focus on each aspect of the episode, the decision to enter, and then the manner of entry, and ask yourselves: was there a denial

of constitutional right, and if there was, is there a valid defense; and that defense, if you find it to be so, would be established only if the officers had a good faith belief in the lawfulness of what they were doing and that belief strikes you as being a reasonable one. And as I have acknowledged, those are not easy questions because they are important values that weigh on both sides, and you have to very conscientiously apply those standards to these facts in making your judgments.

Well, now, when you get to the jury room, you will have the exhibits with you. Determine the facts solely on the basis of the evidence, and then apply the principles of law that I have outlined to you, and render your verdicts fairly, uprightly, and without a scintilla of prejudice.

When you reach a verdict, your verdicts in this case, and as I indicated, you must reach separate verdicts because there are two defendants, each verdict must be unanimous. All of the six jurors who will be in the room must agree before there can be a verdict, but it's the duty of each juror to discuss and consider the opinions of the other jurors, but in the last analysis, it's your individual duty as a jury to make up your own mind and decide this case upon the basis of your own individual judgment and conscience.

When you get to the jury room, select one of your number as foreman or forelady and start your deliberation, and when you have reached verdicts, inform us through the bailiff

and then return to the courtroom.

You will have with you a form of jury verdict by which you can simply check in the appropriate blanks the decision that you have made.

As you will see, you will have this with you, of course, but as to each of the named defendants, in effect, you have three options. You can find a defendant liable to the plaintiff for damages, liable to the plaintiff for punitive damages, or not liable to the plaintiff at all, and you have those same three choices with respect to the second named defendant; and then if you find that one or both of the defendants is liable to the plaintiff, then you have blanks to fill in what amounts you determine in your discretion are appropriate for compensatory damages, if any, and punitive damages, if any.

All right, the jury may retire. I will ask the Clerk to draw one card out, and that card will be the alternate, and the other six will be the jury.

THE CLERK: Number 13, John Elliot.

THE COURT: We will excuse you, Mr. Elliot. It's a little frustrating to come to the end of the line and -- as you can appreciate, it assures us there will be a complete jury to conclude a case, we thank you for your time and attention.

The six members of the jury may retire.

(Jury excused at 4:15 p.m.)

MR. WILLIAMS: No exceptions or further instruction.

MR. FRECHETTE: I would like to keep our record straight. I claim the burden of proof is on the plaintiff, as we discussed before. Secondly, it's my claim that your Honor should have a charge that the situation was not a search, but rather for an arrest under the Tropiano rather than a search, which I think we discussed this morning, as well.

I think punitive damages are not in this case, as I discussed with your Honor before. I thought, and I may be wrong in this, that your Honor had stated that you would charge as a matter of law that the defendants had probable cause for the arrest of the Jones brothers.

THE COURT: Well, I don't think I used the phrase the "matter of law", but I think I said something to the effect that really wasn't in dispute. I think the way I put it, they did have probable cause to arrest upon. I gave them the example: if they saw them on the street, they had the right to arrest them.

MR. FRECHETTE: I missed it, then. I apologize for raising that point. Thank you very much.

MR. EASTMAN: I would like to join in Mr. Frechette's exceptions without reiterating them.

THE COURT: You had previously raised the question whether particularly the standard of defense should be the formulation of the Bivans case or Seventh Circuit.

MR. WILLIAMS: I felt having noticed theCourt of that already, I didn't realize it would be necessary to say it again,

but certainly I adhere to my position.

THE COURT: I raise it because while Courts of Appeals generally lenient in not worrying about the way exceptions are noted, this is the one area where I think they are quite particular when it comes to excepting a charge.

MR. WILLIAMS: I appreciate your bringing it to my attention. I do except to that particular aspect of the charge.

THE COURT: The issues raised by the exceptions have been gone into. They are matters of fair debate, I concede, but I am satisifed that under the appropriate law in this Circuit I should instruct as Ihave.

All right. Marshal will take in the exhibits and we will stand in recess.

(Recess taken.)

THE COURT: Whatever the verdicts are, it was a very fairly and --

MR. WILLIAMS: It was very fairly tried by the Court.

(Jury entered at 5:25 p.m.)

(Verdicts given.)

United States District Court

FOR THE

DISTRICT OF CONNECTICUT

CIVIL ACTION FILE NO. 14,908

KATRINA McEACHERN

vs.

ANDREW CONSIGLIO, an Officer in the New Haven Police Dept. and CURTIS WILLOUGHBY, an Officer in the New Haven Police Dept.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable JON O. NEWMAN, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that plaintiff recover nothing of the defendants and that this action be and is hereby dismissed.

Dated at New Haven, Connecticut, this 17th day of May, 1974.

SYLVESTER A. MARKOWSKI

Clerk of Court

BY: [signature]